LEE GEE LAM

v.

TIMBALAN MENTERI HAL EHWAL DALAM NEGERI, MALAYSIA & ANOR.

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY JC
[CRIMINAL APPLICATION NO. 44-10-93]
29 JUNE 1993

PREVENTIVE DETENTION: Second detention order issued and detenu re-arrested immediately after first detention order held to be invalid - Invalidity of detention order being appealed against - Whether the Minister in issuing the fresh detention order had committed contempt or had acted in a manner contemptuous of the Court's order - Whether detenu entitled to a fresh writ of habeas corpus - Whether Minister had acted mala fide - Whether Minister's actions justiciable - Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 7C.

CONTEMPT OF COURT: Applicant granted writ of habeas corpus - Appeal against decision - Second detention order issued pending hearing of appeal - Whether Minister's action in issuing second detention order was in contempt of Court's order for release of applicant - Whether Court could act against contemnor on its own motion - Whether formal application by complainant necessary.

COURTS: Whether Courts clothed with jurisdiction and power to try and penalise for disobedience of its orders on contempt proceedings - Role and functions of the Courts where statutory provisions are clearly expressed.

The applicant was detained by way of a detention order under s. 4(1) of the Emergency (Public Order and Prevention Of Crime) Ordinance 1969 (the Ordinance). The applicant applied for a writ of *habeas corpus* and the Court ordered the applicant's release on the grounds that the detention order was bad on the face of it due to non-compliance with the provisions of s. 4(1) of the Ordinance.

The applicant was released but was immediately re-arrested and a second detention order was issued against him by the first respondent, which order on the face of it complied with s. 4(1) of the Ordinance. The first respondent had also appealed against the order of release of the applicant.

The applicant applied for a second writ of *habeas corpus* on the grounds that the action of the first respondent in filing the appeal and at the same time effecting re-arrest of the applicant had occassioned a contempt of Court which entitled the applicant to the remedy sought. The applicant further submitted that there was clear evidence of *mala fide* in the exercise and abuse of power by the first respondent.

Held:

[1] Article 126 of the Federal Constitution and s. 13(2) of the Civil Law Act 1956 expressly confer power to the Courts to punish any contempt. As power to enforce entails jurisdiction to enforce, both being synonymous in this context, the same provisions would logically also impliedly confer concomitant powers that are reasonably necessary to enable the Court to do or to enforce the doing of the act or thing.

[2] Contempt of Court also includes that which is calculated to undermine the authority of the Court and to disturb the confidence of a citizen in the unquestioned effectiveness of its orders as against any executive authority however high. However, other than for contempt committed in the face of the Court, the Court should only act against the contemnor upon a formal application in writing by a complainant or if at the instance of the Court, by way of a notice to the contemnor to show cause.

[3] Section 7C(1) of the Ordinance ousts the Court's jurisdiction on matters of *mala fides* or bad faith and immunize from judicial review acts done and decisions made in bad faith (if any) by the Minister. Therefore the applicant's contention that there was *mala fides* on the part of the second respondent in the second detention exercise was not sustainable.

[4] In making a factual basis of a detenu's detention non-justiciable by virtue of the provisions of s. 7C(1) of the Ordinance, the legislature has shown, in no uncertain terms, that it was prepared to yield to the Courts governance of merely procedural and technical matters.

[5] When a provision legislated by Parliament is crystal clear, it leaves no room for variation by the Courts under the guise of the interpretation of the law. For the Court to intervene in the teeth of the provision in s. 7C(1) of the Ordinance would be tantamount to legislation and encroachment of the exclusive right of Parliament to make laws.

[Application for writ of habeas corpus refused].

Cases referred to:
Lim Thian Hok @ Lim Thiam Hock v. Minister of Home Affairs & Anor. [1993] 1 MLJ 214 ***(foll)***
Prahalad Panda v. Province of Orrisa AIR (37) 1950 Orissa 107 ***(refd)***
Searches case 74 ER p. 65 ***(refd)***
R v. Home Sec. Ex parte Budd 1 AER [1941] 749 at p. 750 ***(refd)***
The State v. Somnath Mahpatra AIR 1953 Orissa 33 at p. 38 ***(refd)***
Subodh Singh v. Province of Bihar AIR (36) 1949 Patna 247 at p. 249 ***(refd)***
MBf Holdings Bhd. & Anor. v. Houng Hai Kong & 2 Ors. [1993] 3 CLJ 373 ***(foll)***
Montreal Street Railway Co. v. Normandin [1917] AC 170 ***(refd)***
State of Uttar Pradesh v. Manbodhan Lal Srivastava [1958] SCR 533 ***(refd)***
Rajoo s/o Ramasamy v. Inspector General of Police & Ors. [1990] 1 CLJ 554, 888 / [1990] 2 MLJ 87 ***(refd)***
Petitioner v. Province of Orissa, AIR (37) 1950 Orissa 107 (CN 17) ***(refd)***
Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129, 136 ***(foll)***
Sadhu Singh v. The Delhi Administration AIR 1966 SC 91 ***(foll)***
Minister of Home Affairs, Malaysia & Anor. v. Karpal Singh [1988] 3 MLJ 29 ***(foll)***
Liversidge v. Anderson [1942] AC 206 ***(refd)***
Greene v. Secretary of State for Home Affairs [1942] AC 284 ***(refd)***
Aminah v. Superintendent of Prison, Pengkalan Chepa, Kelantan [1968] 1 MLJ 92 ***(refd)***
Priyatosh Mazumdar v. State of West Bengal AIR 1963 Cal. 589 ***(refd)***
Wong Fook Nyen v. Timbalan Menteri Dalam Negeri Malaysia & 2 Ors. [1988] 2 CLJ 274 ***(refd)***
Re Jimmy Loh Huan Moh's case [1968] 2 MLJ 93 ***(refd)***
Roberts v. Charing Cross, Euston and Hampstead Railway Company - 734 Vol. LXXXVII The Law Times, 28 February 1903 ***(refd)***
Southwark and Vauxshall Water Company v. Wandsworth District Board of Works 79 LT Rep. 132; [1898] 2 Ch 603 ***(refd)***
Lee Mau Seng v. Minister of Home Affairs, Singapore & Anor. [1971] 2 MLJ 137 ***(refd)***
Chng Suan Tze v. Minister of Home Affairs & Ors. [1989] 1 MLJ 69 ***(refd)***
Teo Soh Lung v. Minister for Home Affairs & Ors. [1989] 2 MLJ 449 ***(refd)***
Vincent Cheng v. Minister for Home Affairs & Ors. [1991] 1 MLJ 449 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 13(2)
Criminal Procedure Code, s. 365(1)(b)
Dangerous Drugs (Special Preventive Measures) Act 1985, s. 11C(1)
Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 4(1), 7C(1)
Federal Constitution, Articles 5(2), 126, 160(1), Schedule II
Internal Security Act, s. 8B(1)
Interpretation Act 1967, ss. 40, 65(1), (2)
Interpretation and General Clauses Ordinance 1948, s. 30
Constitution of the Republic of Singapore, Article 149 (Singapore)
Internal Security Act, ss. 8(1), 10 (Singapore)
Internal Security (Amendment) Act 1989, s. 8B(2) (Singapore)

Other sources referred to:
Crawford on Statutory Construction - Article 261, p. 516
Halsbury's Laws of England (Hailsham Edn.) Vol. VII, p. 6 para 8
Oswald on Contempt, 3rd Edn., p. 6

For the applicant - Karpal Singh; M/s. Karpal Singh & Co.
For the respondent - Noorbahari, SFC

JUDGMENT

Vincent Ng Kim Khoay JC:
This is an application for a writ of *habeas corpus* based on several grounds set out in the affidavit of Siou Fei Shun sworn on 29 January 1993 (Enclosure 2).

However, at the outset of the hearing Counsel for applicant, Encik Karpal Singh, had agreed that the application be confined only to one ground, as detailed in paragraph 11 (iv) to (vii) of Enclosure 2. Briefly, the sole ground canvassed by Counsel is as follows:

His client was detained by virtue of a detention order dated 22 April 1992 (the first detention order) issued by the first respondent under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (the Ordinance). The first detention order was expressed as follows:

> BAHAWASANYA saya, Menteri dalam Negeri berpuashati yang perintah ini adalah perlu dibuat ke atas orang yang namanya tersebut di bawah ini dengan tujuan hendak mencegah beliau daripada melakukan perbuatan dengan apa-apa cara yang memudaratkan ketenteraman awam atau untuk menghapuskan kekerasan atau mencegah jenayah yang melibatkan kekerasan.
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> | Nama | Nombor Kad Pengenalan |
> |---|---|
> | Lee Gee Lam | 7044853 |
>
> Oleh yang demikian, pada menjalankan kuasa diberi kepada saya di bawah s. 4(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969, maka saya mengarahkan

dengan perintah ini supaya orang yang namanya tersebut di atas ditahan selama dua tahun mulai dari 22 April 1992 di Pusat Pemulihan Akhlak, Pulau Jerejak, Pulau Pinang...

In the case of *Lim Thian Hok @ Lim Thiam Hock v. Minister of Home Affairs & Anor.* [1993] 1 MLJ 214 I had held that s. 4(1) of the Ordinance ought to be read disjunctively and as such a detention order under the provision should be expressed and based on either of the two grounds for detention in s. 4(1) but not both the grounds as they are distinctly different grounds. As the grounds stated in the detention order therein were stated in the alternative, it therefore became bad and invalid on the face of it for want of compliance with s. 4(1) of the Ordinance which states as follows:

> If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order (hereinafter referred to as a "detention order") directing that that person should be detained for any period not exceeding two years.

Following my decision in that case, a writ of *habeas corpus* dated 21 December 1992 was granted to the applicant by this Court also on the same ground that the first detention order, in which the grounds for detention were similarly expressed in the alternative, was bad on the face of it due to non-compliance with s. 4 (1) of the Ordinance.

As ordered by the Court on 21 December 1992 the respondent released the applicant on 21 December 1992 but immediately re-arrested him on the same day, and a few weeks thereafter issued and served on him a fresh detention order dated 18 January 1993 (the second detention order). The second detention order stated as follows:

> BAHAWASANYA saya, Menteri Dalam Negeri berpuashati yang perintah ini adalah perlu dibuat ke atas orang yang namanya tersebut dibawah ini dengan tujuan hendak mencegah beliau daripada melakukan perbuatan dengan apa-apa cara yang memudaratkan ketenteraman awam.
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> | Lee Gee Lam | 7044853 |
>
> Oleh yang demikian, pada menjalankan kuasa yang diberi kepada saya di bawah s. 4(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969, maka saya mengarahkan dengan perintah ini supaya orang yang namanya tersebut di atas ditahan selama dua tahun mulai dari 18 Januari 1993 di Pusat Pemulihan Akhlak, Pulau Jerejak, Pulau Pinang...

Thus, the grounds of detention in the second detention order were not stated in the alternative, as occurred in the first detention order. There was thus a correction on the face of the second detention order by a deletion of the second limb in s. 4 (1) of the Ordinance.

On 18 January 1993 the respondent filed a notice of appeal against the decision of this Court dated 21 December 1992 and also requested for the supply of the notes of evidence while at the same time issued a fresh detention order dated 18 January 1993 (the second detention order) against the applicant.

The applicant stated that the grounds of detention and the allegation of facts in both the first and the second detention orders were one and the same. It was also submitted that the actions of the first respondent were clearly wrong in law, has occasioned an abuse of power and fraud on the power conferred upon him, in that the action of the first respondent in filing an appeal to the Supreme Court and at the same time effecting re-arrest of the applicant, has occasioned a contempt of Court. As such, it was further submitted that the continued detention of the applicant was against the law due to the contempt committed, and a writ of *habeas corpus* should thereby issue. Counsel had submitted as follows.

> The grounds in the two detention orders are identical. Re-arrest on the same grounds amounts to contempt of Court. See *Prahalad Panda v. Province of Orissa* AIR (37) 1950 Orissa 107. See *Searches* case 74 ER p. 65. See *R v. Home Sec. Ex parte Budd* 1 AER [1941] 749 at p. 750. See *The State v. Somnath Mahpatra* AIR [1953] Orissa 33 on at p. 38. See *Subodh Singh v. Province of Bihar* AIR (36) 1949 Patna 247 at p. 249. There is abuse of power and contempt of Court. These are grounds on which *habeas corpus* can issue. Section 7C is no bar to Court exercising its powers under Article 5(2) and s. 365(1)(b) of Criminal Procedure Code. Applicant would move the Court for *habeas corpus* based on this issue.

It was further submitted that if the respondent's appeal was successful there would be two orders

in respect of the same detenu but yet if the appeal was not successful the applicant would be penalised for having succeeded in having obtained the writ of *habeas corpus* on 21 December 1992, as the second order is expressed to detain the applicant for a period of 2 years with effect from 18 January 1993 without any discount for the period that he had already served under the first detention order. To quote Counsel:

> My contention is that there is *mala fide* which is more than transparent in the sinister exercise of and abuse of power by the Timbalan Menteri Dalam Negeri. If a detention is *mala fide* then the Court has jurisdiction to intervene and put right what has been a manifest abuse of power.

Counsel had also made an oral application to this Court as follows:

> I am also applying that the Deputy Minister be cited for contempt of Court. As an officer of the Court I have the right to make this oral application and the Court has inherent power to cite any person or authority however high who is in contempt of the Court's orders.

It was however conceded by Counsel that there was no separate application, or prayer in the current application, for leave to cite the Minister for contempt.

The issues for judicial determination would thus be:

(1) Whether the Courts are cloathed with jurisdiction and power to try and penalise those who disobeyed its orders on contempt proceedings. This point in the negative, has been canvassed by Counsel in the case of *MBf Holdings Bhd. & Anor. v. Houng Hai Kong & 2 Ors.* [1993] 3 CLJ 373 conversely to the position that he has now adopted in the current matter, in view of his aforesaid oral application for the Minister to be cited for contempt. The corollary of this application being that the Courts have the power and the jurisdiction to try and penalise for acts in contempt of its orders.

(2) Whether the Minister had committed contempt or had acted in a manner contemptuous of the Court's order of 29 January 1993, thus entitling the applicant to a fresh writ of *habeas corpus* in the current application.

(3) Whether the Minister had acted *mala fide* and whether in view of s. 7C of the Ordinance, same is justiciable.

(4) Even upon the assumption that a contempt of Court has been committed, could the Court act against the contemnor on its own motion, without a formal application by the complainant.

Lastly, by way of postlude, the role and functions of the Courts where statutory provisions are clearly expressed.

Counsel further contended in his written submission dated 1 June 1993 that the amendment embodied in s. 7C of the Ordinance has no application to s. 4 (1) of the Ordinance due to the use of the words "discretionary powers" in s. 7C whereas in s. 4(1) the phrase "shall make an order" therein gave the Minister no discretion. I find no merit or substance at all in this argument as it is plainly evident that s. 7C is an amendment pointedly meant for the operation of s. 4(1) of the same Ordinance and the phrase "any act done or decision made by the Minister" must necessarily refer to act done or decision made by the Minister under s. 4(1) of the Ordinance. In any event, the word "shall" in a statute, though generally taken in a mandatory sense does not necessarily mean that in every case it shall have that effect. The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is expressed. See *Montreal Street Railway Co. v. Normandin* [1917] AC 170, *State of Uttar Pradesh v. Manbodhan Lal Srivastava* [1958] SCR 533 and **Crawford on Statutory Construction** - Article 261 at p. 516. The word "shall" used in s. 4(1) could not be taken in the mandatory sense as otherwise it would defeat the intention of the Ordinance if every arrest must be followed with a detention order.

On the Courts jurisdiction to punish for contempt:

The Supreme and the High Court has always exercised absolute and plenary power of punishment for contempt which has been enshrined in Article 126 of the Malaysian Constitution ("the Constitution").

Article 126 of the Constitution states that the Supreme Court or a High Court shall have power to punish any contempt of itself. There is no specific Enactment passed by Parliament for contempt of Court, though s. 13(2) of Civil Law Act 1956 also provides that "the High Court shall have power to punish any contempt of

itself". It may perhaps be essential to decide whether the phrase "power to punish for contempt of itself" includes jurisdiction to punish and to enforce punishment for such contempt.

The question is whether s. 30 of the Interpretation and General Clauses Ordinance 1948 (the repealed Ordinance) or s. 40 of the Interpretation Act 1967 ("the Interpretation Act") would be applicable to interpret Article 126 of the Constitution. Both sections, section 30 of the repealed Ordinance and s. 40 of the Interpretation Act state as follows:

> Where a written law confers power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also conferred as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.

Article 160 (1) of the Constitution states as follows:

> The interpretation and General Clauses Ordinance 1948, as in force immediately before Merdeka Day shall, **to the extent specified in the Eleventh schedule,** apply for the interpretation of this Constitution as it applies for the interpretation of any written law within the meaning of that Ordinance, but with the substitution of references to the Yang di-Pertuan Agung for reference to the High Commissioner.

The Interpretation and General Clauses Ordinance 1948 was repealed by virtue of s. 65(1) of the Interpretation Act 1967. However, s. 65(2) of the Interpretation Act states as follows:

> Notwithstanding sub-section (1), the Ordinance thereby repealed shall continue to apply to any written law to which it applied immediately before the commencement of this Act and to subsidiary legislation made after the commencement of this Act under such a written law.

However, as words to similar effect as expressed in s. 30 of the repealed Ordinance and s. 40 of the Interpretation Act are not specified in and therefore excluded from the Eleventh Schedule of the Constitution, the provisions cannot therefore apply for the interpretation of the Constitution unless the Eleventh Schedule to the Constitution is amended. See *Rajoo s/o Ramasamy v. Inspector General of Police & Ors.* [1990] 2 MLJ 87. A mere Act of Parliament, unless expressly provided by the Act or the Constitution itself, cannot be applied for the interpretation of the Constitution. This is so, as the Constitution is the supreme law of the land; it embodies the very basic tenets on which the nation is founded and is sacrosanct. It is sacrosanct as it bears, *inter alia*, the exclusive hallmark in that it requires the essential two-thirds majority vote in Parliament to amend same. Even without the aid of s. 30 or s. 40 aforesaid, yet, when Article 126 of the Constitution, is read in conjunction with s. 13 (2) of the Civil Law Act 1956, it is clear beyond any doubt that the framers of the Constitution and the Legislature had intended that the Supreme Court and the High Court are also to be cloathed with jurisdiction and authority to mete out punishment for contempt, unless we hold perversely to the trite maxim, that both aforesaid bodies had acted in vain.

Where the said Article 126 and s. 13 confer power to the Courts to punish any contempt the same provisions would logically also impliedly confer concomitant powers that are reasonably necessary to enable the Courts to do or to enforce the doing of the act or thing, surely, power to enforce entails jurisdiction to enforce, both being synonymous in this context. I may also add for completeness, that it is untenable to interpret the phrase "contempt of itself" by the legislature to mean only contempt in the face of the Court and to exclude conduct which are in contemptuous disregard of the Court's orders. It is hardly necessary to employ the accepted canons of construction of words here, as the expression "contempt of itself" is plain enough to enable this Court to hold that it cannot be said that a person who acts in contempt of Court orders does not necessarily act in contempt of the Court itself. I concur with the decision of Anuar J. on this point in *MBf Holdings Bhd. & Anor. v. Houng Hai Kong & 2 Ors.*

On contempt of Court:

What constitutes contempt of Court is succinctly stated in **Halsbury's Laws of England** (Hailsham Edn.) Vol. VII, p. 6 para 8 in the following passage:

> any act done or writing published which is calculated to bring a Judge into contempt or to lower his authority or to interfere with due course of justice or the lawful process of the Court is contempt.

Oswald also defines contempt to be constituted by:

> any conduct that tends to bring the authority and administration of law into disrespect

or disregard or interfere with or prejudice parties, litigants or witness during the litigation.
(See **Oswald on Contempt,** 3rd Edn., p. 6).

It may be seen from these passages that contempt is of two kinds: *viz*.,

(a) that which interferes with the due course of justice and pollutes the stream of justice, in so far as it concerns parties to a cause, as for instance, when comments are made on a pending case, and
(b) that which is calculated to bring a Judge into contempt or lower his authority or to interfere with the lawful process of the Court.

There can be no doubt therefore that any act which is calculated to undermine the authority of the Court and to disturb the confidence of the citizen in the unquestioned effectiveness of its orders as against any executive authority however high, would be contempt. Of course, this is not to say that every act will necessarily be treated as contempt by Courts in whom this drastic and summary jurisdiction is vested, not for the personal glorification of a Judge in his office, but for the effective maintenance of the strong arm of judicial administration. None is more conscious than a Judge how sparingly such drastic and summary power is to be used [as defined in *The State v. Somnath Mahpatra* (AIR 1953) Orissa 33 (Vol. 40, C.N. 17)].

In *Petitioner v. Province of Orissa,* AIR (37) 1950 Orissa 107 (CN 17) where a detenu was released by the High Court on the ground of invalidity of order of detention and was immediately re-arrested under a camouflaged order of detention containing substantially the same grounds of earlier illegal order without existence of any fresh material giving rise to fresh occasion for passing the order, it was held that the second detention order was illegal especially when it is not attempted to be justified by invoking the provisions of the Amending Act (VI [6] of 1949).

It was further held that even if the order of the District Magistrate might have been passed with the best of motives in view of the apprehension that the detenu, after release, might go underground, it would none-the-less be contempt of Court *prima facie.* (Rule *nisi* for contempt issued). However, this case - as with a plethora of other Indian and two English cases cited by Counsel - have no application to our current case as the Indian and English detention laws do not encompass any provision expressed in terms similar to our s. 7C (1).

In a detention under s. 4(1) of the Ordinance, the question that the Courts could decide, is whether the detention order issued by the Minister was within the prescribed purview of this statutory provision. I hold that the Minister had acted within such purview when he issued the second detention order.

As the Minister clearly has the power under s. 4(1) of the Ordinance, to issue a fresh order of detention during the pendency of an application challenging the validity of a prior order of detention his issue of the second detention order cannot *per se* constitute contempt of Court.

It is important to note that in the instant case, the Minister had not only complied with the writ of *habeas corpus* issued from this Court in respect of the first detention order but, the manner of wording of the grounds for detention in the second detention order also shows that the Minister subscribes to this Court's view that s. 4(1) of the Ordinance should be read disjunctively. This is shown by the cancellation of the second limb in the grounds of detention stated in the second detention order. Incidentally, the grounds for detention appearing on the face of the detention order is distinguishable from the factual basis of the issuance of the detention order, the former being justiciable but not the latter. Thus, I hold that no contempt of Court had been committed by the Minister in the circumstances of the case.

Whether there was mala fides and the position ante the amendment in s. 7C(1) (ouster provision):

It is settled law that the subjective determination of the Minister is not justiciable (*Karam Singh v. Menteri Hal Ehwal Dalam, Negeri, Malaysia* [1969] 2 MLJ 129, 136, *Sadhu Singh v. The Delhi Administration* AIR [1966] SC 91, and *Minister of Home Affairs, Malaysia & Anor. v. Karpal Singh* [1988] 3 MLJ 29. The Courts have consistently declined to review the exercise of ministerial discretion when its validity is impugned in *habeas corpus* proceedings (*Liversidge v. Anderson* [1942] AC 206, *Greene v. Secretary of State for Home Affairs* [1942] AC 284. The Court cannot be invited to undertake

an investigation into the sufficiency of the matters upon which the satisfaction of the Minister purports to be grounded but can examine the grounds disclosed by the Minister to see they are relevant to the object which the Ordinance prescribes.

The burden of proving lawful justification for the detention lies on the respondents. This they do by relying on the detention order which must be made in the exercise of a valid legal power, in this case s. 4 (1) of the Ordinance. In my view, the position prior to the amendment embodied in the ouster provision s. 7C (1) (infra) was that, once this was shown it was for the detenu to show that the power was exercised *mala fide* or improperly for a collateral or ulterior purpose *in fraudem legis* (*Karam Singh* (supra), *Aminah v. Superintendent of Prison, Pengkalan Chepa, Kelantan* [1968] 1 MLJ 92. The subjective satisfaction of the Minister would be a sufficient justification for the detention unless - as was the position then - the detenu could show that the power vested in the Minister to make the order with regard to him had been exercised *mala fide* or in bad faith.

That a fresh detention order was issued when the appeal to the Supreme Court in respect of the decision of the High Court on the previous detention order does not by itself vitiate the second order of detention nor does it show bad faith, as it is my considered view that the object and ambit of the Ordinance is such and the purposes specified in s. 4(1) are so wide as to allow the Minister in the circumstances of this case to issue repeated detention orders against the applicant. See *Priyatosh Mazumdar v. State of West Bengal* AIR [1963] Cal. 589. Neither does it *ipso facto* amount to the exercise of the Minister's powers under s. 4(1) of the Ordinance for ulterior purposes or purposes other than that mentioned in the detention order so as to vitiate and render it *mala fide.* The onus of proving *mala fides* on the part of the detaining authority is on the applicant and is normally extremely difficult to discharge as what is required is proof of improper or bad motive and not mere suspicion. See *Wong Fook Nyen v. Timbalan Menteri Dalam Negeri Malaysia & 2 Ors.* [1988] 2 CLJ 274.

In *Re Jimmy Loh Huan Moh's* case [1968] 2 MLJ 93 Basu's Commentary reads:

> Where a person who has been deprived of his liberty challenges the detention by a petition for *habeas corpus,* it is for the authority who has detained him to show that the person has been detained in exercise of a valid legal power. Once that is shown, it is for the detenu to show that the power has been exercised *mala fide* or improperly.

In this connection Basu's Commentary further states:

> 'Bad faith' in the present context has been interpreted to mean 'malice in law', that is, inflicting a wrong or injury upon another person in contravention of the law, even though it may be without any malicious intention. Good faith is obviously wanting where there is a 'fraud on the statute', that is, a misuse of the statute for a collateral purpose or a purpose other than that for which it was intended, - or, in other words, a 'colourable use' of the statute.

In *Roberts v. Charing Cross, Euston and Hampstead Railway Company* - 732 at 734 Vol. LXXXVII The Law Times, 28 February 1903 - Lord Macnaghten refers to a remark of the Master of the Rolls in *Southwark and Vauxhall Water Company v. Wandsworth District Board of Works* 79 LT Rep. 132; [1898] 2 Ch 603 and goes on: "In a word, the only question is, Has the power been exceeded? Abuse is only one form of excess". This was regarded as a matter of principle. If the legislature has given powers and those powers are being used for the purpose of carrying out the work authorised and it is admitted that the mode in which they are being used is unreasonable, that is an abuse of the power so given and is therefore *ultra vires.*

The fact that the Minister had not taken into account or to account in favour of the applicant the period that the applicant had already served under the first detention order and that there would be two parallel detention orders in existence should the respondent succeed in their appeal to the Supreme Court does not by itself necessarily lead to the inference that there was bad faith or *mala fides* on the part of the detaining authority: the Court would require very much more than that to hold that bad faith was established. The Court can however examine, and this Court is satisfied that the grounds disclosed by the Minister on the face of the second detention order are relevant to the object which the Ordinance prescribes and are not *ultra vires* s. 4(1) of the Ordinance. There was thus no *mala fides* on the part of the Minister in the circumstances shown.

Whether mala fides justiciable in the light of s. 7C (1)

Section 7C(1) of the Ordinance states as follows:

> There shall be no judicial review in any Court of, and no Court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this ordinance, save in regard to any question on compliance with any procedural requirement in this Ordinance governing such act or decision.

On this issue, it is perhaps useful to look at the the forensic evolution of the following four cases decided by the Courts in Singapore which have persuasive bearing on my decision in the instant case. They are:

(i) *Lee Mau Seng v. Minister of Home Affairs, Singapore & Anor.* [1971] 2 MLJ 137
(ii) *Chng Suan Tze v. Minister of Home Affairs & Ors.* [1989] 1 MLJ 69
(iii) *Teo Soh Lung v. Minister for Home Affairs & Ors.* [1989] 2 MLJ 449
(iv) *Vincent Cheng v. Minister for Home Affairs & Ors.* [1991] 1 MLJ 449

In *Lee Mau Seng* it was held that the subjective test applies in determining the proper exercise of the discretionary power of the President or the Minister under the Singapore ISA and "*mala fides*" or bad faith is not a justiciable issue in the context of the Singapore ISA.

Then, in *Chng Suan Tze*, the Singapore Court of Appeal allowed the detenu's appeal on the ground that there was no sufficient evidence of the President's satisfaction as required under s. 8(1) of the Singapore ISA but however, went on obiter to add that the President"s satisfaction under s. 8 of the Singapore ISA and the Minister's satisfaction under s. 10 of the ISA are reviewable by a Court of Law as, to quote:

> The subjective test adopted in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia* [1969] 2 MLJ 129 and its progeny can no longer be supported and the objective test is applicable upon a judicial review of the exercise of these discretions.

This was followed very swiftly by an amendment by Act No. 1/89, to Article 149 of the Singapore Constitution, passed by Parliament on 25 January 1989 (which came into force on 27 January 1989) and by simultaneous amendment in the Singapore Internal Security Act (Singapore ISA) by the Internal Security (Amendment) Act 1989. Both the respective amendments in the Singapore Constitution and the amendment in the Singapore ISA which included, *inter alia*, a new provision under s. 8B (2), ousted the jurisdiction of the Court from judicial review of the President's or the Minister's exercise of their discretion in preventive detention cases and restored the law which the courts had followed in and since *Lee Mau Seng* until the decision of the Court of Appeal in *Chng Suan Tze*. The new s. 8B incorporated in the Singapore ISA reads and provides substantially the same as the Malaysian s. 7C(1) of the Ordinance, s. 8B(1) of our Internal Security Act and s. 11C(1) of our Dangerous Drugs (Special Preventive Measures) Act 1985. [Section 7C(1), 8B (1) and 11C(1) aforesaid].

It is unnecessary and outside the proper scope of this judgment to deal with the question whether a similar amendment had been made to our Constitution when the amendments embodied in s. 7C (1), s. 8B(1) and s. 11C (1) aforesaid were passed by Parliament. And if the answer is in the negative, whether the said ss. 7C(1), 8B(1) and 11C(1) would be *ultra vires* the Malaysian Constitution due to their ouster of the Court's jurisdiction against the basic principle of separation of powers and preserving the exclusive functions of the Courts in exercising judicial power under the Constitution, which entails delving into a labyrinth of the concept, the ramification and extent of independence of the three distinguishable organs of Government. For the purpose of this judgment, I accept the amendment under the said ss. 7C(1), 8B(1) and 11C (1) as valid law.

As I said earlier, the *ratio decidendi* in *Lee Mau Seng* was reaffirmed by the new s. 8B(2) in the Singapore ISA, wherein the Court further held that "*mala fides*" or bad faith is not a justiciable issue. Likewise I am persuaded, and I hold that in our current case, the amendment under s. 7C(1) of the Ordinance, which not only reaffirmed the *ratio decidendi* in *Karam Singh* and *Karpal Singh* on the question of subjective satisfaction, but also have the further similar effect as in *Lee Mau Seng*, of ousting our Court's jurisdiction on matters of *mala fides* or bad faith on the part of the Minister, and immunize from judicial review acts done and decisions made in bad faith (if any) by the Minister.

Thus, having found *(supra)* that the facts of the case do not disclose any *mala fides* or bad faith

on the part of the Minister, I also here hold that the applicant's challenge on the grounds of *mala fides* and improper purpose cannot be raised in the present proceedings in any event.

For the above reasons, the contention that there was *mala fides* on the part of the Minister in the second detention exercise is not sustainable and the further contention by Counsel that the Minister had committed contempt of Court in issuing the second detention order is equally untenable.

Could the Court act against Contemnor without formal application:

On the last issue for determination, it is settled law that other than for contempt committed in the face of the Court, Courts should only act against the contemnor upon a formal application in writing by a complainant; or if at the instance of the Court, by way of a notice to the contemnor to show cause. The oral application to cite the Minister for contempt is thus untenable.

In the result, the application fails. *Habeas corpus* is refused.

By way of Postlude:

I should perhaps by way of postlude add that the Court must never, in my view lose sight of the fact that a detention order made under s. 4(1) of the Ordinance results in the deprivation of freedom without trial and constitutes a serious transgression upon the fundamental right of liberty of the person.

The grant of *habeas corpus* is as of right and not in the discretion of the Court as in the case of such extraordinary legal remedies as *certiorari*, prohibition and *mandamus*. It is a writ of right against which no privilege of person or position can be of any avail.

However, in making the factual basis of the detenu's detention non-justiciable, by virtue of the provision in s. 7C(1) the legislature has shown in no uncertain terms that it was prepared to yield to the Courts, governance of merely procedural and technical matters, including e.g. the placement of full stops and commas where they affect such matters, and semantics. It is by virtue of this provision that I have held in *Lim Thian Hock v. Minister of Home Affairs & Anor. (supra)* that the Courts are debarred from lifting the veil to peep or peek into or to examine the factual basis of the Minister's decision.

It is noteworthy that all those applicants including the present applicant (in respect of the first detention order, *supra*) who were able to secure writs of *habeas corpus* from this Court, had succeeded solely on procedural or technical rather than substantive grounds. There are also occasions in the past where I have ordered the release of the detainees upon the grounds that the detention orders were not signed. Consequently, if a detenu is released upon grounds which are based on form rather than substance - it being the factual basis of detention - it is untenable for the applicants to allege or for the Court to hold that the Minister had been contemptuous of the Court's ruling when he released and re-arrested the detenu by regularising the procedural or technical defect. Since the amendment incorporating s. 7C in the Ordinance, all *habeas corpus* applications have been essentially founded only on technical or procedural grounds; and notably, such grounds are narrowing by the day.

Indeed, it all boils down to a battle of wits between, on the one hand Counsel's ingenuity in discovering new technical defects and shortfalls in the procedure of detention - no less calling upon his ability to scan the detention orders and affidavits-in-reply-with the eyes of a hawk - and on the other hand, the degree of conscientiousness and meticulousness of the officers who prepare such documents, the upshot of which has the salutary effect of encouraging such officers to buck-up in favour of efficiency, learnt through the tedious exercise of release and re-arrest of the detenu.

It ought to be noted that the authorities have never failed to release the detenu as ordered by the Court. This, if it had been the case, would be contemptuous of the Court order, as has occurred in some Indian cases cited by Counsel. However, the current complaint is that it has been the common practice by the authorities to re-arrest the detenu upon or hot after his release. Thus, precious few applicants have been able to secure real or effective release from, detention through writs of *habeas corpus*. Indeed, according to Counsel this practice would also have the effect of penalising their clients for having succeeded in obtaining a writ of *habeas corpus* when one considers that the period of 2

years of detention under the fresh detention order is imposed on the detenu without regard to the period that the latter had already served under the earlier detention order.

If it is thought necessary to change this position, then the Court is a wrong forum as it should be the subject of legislation. For the Court to intervene in the teeth of the provision in s. 7C(1) above, would be tantamount to legislation and encroachment upon the exclusive right of Parliament to make laws, especially when such provision leaves no room for interpretation by the Courts.

The process of Government involves three distinguishable and independent functions, legislative (law-making), executive (carrying into effect of policies and laws made) and judicial (decision on disputes and controversies arising incidentally out of the other functions). The way in which these functions are to be exercised and by whom is determined by the Constitution of Malaysia. In a nutshell, each of the three organs of government operates by respectively making, applying and enforcing laws on individuals and bodies in particular cases.

It is needless to emphasise that in a veritable democracy, where the independence - nay, not even interdependence - of the three principal branches of government being the executive, the judiciary and the legislative bodies are so very essential and strongly advocated, it would hardly inspire mutual desire to preserve or respect such independence one from the other, if the sanctity of the tenets for ensuring such independence are not observed.

When a provision legislated by Parliament is crystal clear it leaves no room for variation by the Courts under the guise of interpretation of law; though, conversely, needless to say, the Courts would be abdicating its duties if it declines, in appropriate cases, to interpret equivocal or nebulous provisions of the law, if only to lend sensible or practical and empirical meaning to such provisions. The responsibility for clear and lucid crafting of language in a legislation, thus lies surely and squarely on the shoulders of the legal draftsman.

The Court have in the past consistently refused to intervene in cases where the provision of the law is clear and unambiguous.

I subscribe to and quote the following extract from the speech of Lord Scarman in *"Duport Steel Ltd. v. Sirs* [1980] 1 All ER 529:

> ... in the field of statute law the Judge must be obedient to the will of Parliament as expressed in its enactment. In this field Parliament makes and unmakes the law and the Judge's duty is to interpret and to apply the law, not to change it to meet the Judge's idea of what justice requires. Interpretation does, of course, imply in the interpreter a power of choice where differing constructions are possible. But our law requires the Judge to choose the construction which in his judgment best meets the legislative purpose of the enactment. If the result be unjust but inevitable, the Judge may say so and invite Parliament to reconsider its provision. But he must not deny the statute. Unpalatable statute law may not be disregarded or rejected, merely because it is unpalatable.